85-1299

No.

Supreme Court, U.S.
FILED
JAN 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES LAURENT, Youth Supervisor II, et al.,

Petitioners,

vs.

JEFFREY WATTS,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Printed by Authority of the State of Illinois (P.O. 33101—55—1-27-86)

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Nos. 84-2219 and 84-2290

JEFFREY WATTS,

Plaintiff-Appellant, Cross-Appellee,

v.

JAMES LAURENT, Youth Supervisor II., et al.,

Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 82 C 4593—**Bernard M. Decker**, *Judge.*

ARGUED JUNE 4, 1985—DECIDED SEPTEMBER 18, 1985

Before CUDAHY and EASTERBROOK, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge.*

CUDAHY, *Circuit Judge.* Plaintiff, Jeffrey Watts, suffered a severe injury to his left leg and hip while he was an inmate at the Illinois Youth Center located in St. Charles, Illinois. He brought this suit, under 42 U.S.C. § 1983, against several state employees who worked at the Youth Center, alleging they violated his constitutional right to be free from cruel and unusual punishment. After trial, a jury returned verdicts against five defendants, but the trial court granted one of the defendants, Barry Steele, judgment notwithstanding the verdict. The remaining defendants appeal the verdicts against them, and plaintiff appeals the court's decision in favor of defendant Steele. Plaintiff also attacks the trial court's decision to grant defendants' post-trial motion to clarify the amount of the judgment.

I.

The Youth Center at St. Charles is designated a medium/maximum security facility, and houses several hundred young criminal offenders. Plaintiff Jeffrey Watts arrived there on July 21, 1981, at which time he had just turned fifteen and weighed about 125 pounds. When residents arrive at the Youth Center, administrators assign them to a cottage according to their disposition and background. Watts was assigned to Pierce Cottage. Employees designated as "youth supervisors" oversee the residents. Four of the five defendants involved in this appeal[1]—Althea Brown, Geri Cejka, James Laurent and Steven VanJoske—were youth supervisors at the Center while Watts was there. Their duties included taking regular head counts, conducting residents to and from meals and classes, keeping daily records on each resident's behavior and administering discipline. The fifth defendant, Barry Steele, acted as a "team leader," and was also responsible for supervising the Teen Center, a recreational facility for the residents.

On January 22, 1982, the residents of Pierce Cottage met outside the cafeteria after lunch. Defendants Brown and VanJoske were taking a head count before leading the residents back to the cottage, when several residents began running over the field in the direction of Pierce. There was conflicting testimony about whether the students had been given permission to run. One of those running was plaintiff Watts; another was Derrick Greaves. The testimony was in conflict about what happened next. Watts testified he was running when he suddenly found himself on the ground with Greaves on top of him; he claimed Greaves had attacked him. Defen-

[1] Two additional defendants were dismissed from the action prior to trial and another defendant received a directed verdict in her favor at the close of plaintiff's case in chief. Plaintiff does not question these dismissals on appeal.

dants, on the other hand, argued that Watts had slipped on some ice. Watts suffered permanent damage to his hip joint, severely impairing his ability to walk and run.

Plaintiff's theory at trial was that Greaves had threatened Watts at least four times prior to the attack, and that defendants were aware of these threats but took no action to protect him. Greaves had arrived at the Youth Center on November 25, 1981, after being transferred from a minimum security prison at Valley View, Illinois because of his behavior there. During the relevant period, Greaves was about 5'7" tall and weighed approximately 155 pounds. Watts testified at trial that many of the inmates at the Youth Center were members of gangs, and that several gangs had attempted to recruit him although he never joined one. Other testimony indicated that Greaves considered himself the "chief" of one gang, the Black Gangster Disciples. Various evidence supported the inference that the threats and attack could have been gang-related, in that Watts' independence prior to the attack undermined Greaves' authority as a gang chief. Plaintiff's evidence indicated that each of the four defendants who were youth counselors overheard incidents in which Greaves threatened Watts. Although there was no direct evidence that defendant Steele ever overheard such a threat, Watts' theory at trial was that Steele became aware of the danger to Watts through his knowledge of Greaves' record, his opportunity to observe Greaves' behavior and his recognition that Watts was much smaller than Greaves and other residents. All of the defendants testified that they were not aware of any extraordinary animosity between Watts and Greaves. Additional facts are noted in the remainder of this opinion where pertinent.

II.

Defendants Laurent, Cejka, Brown and VanJoske each argue that the trial court erred in refusing to grant their motions for judgment notwithstanding the verdict,

because no reasonable jury could have found that they violated plaintiff's eighth amendment right to be free from cruel and unusual punishment. More particularly, these defendants deny that they had any knowledge of the danger plaintiff claims was posed by Derrick Greaves.

A motion for judgment notwithstanding the verdict is properly denied where the evidence and all reasonable inferences, when viewed in the light most favorable to the party opposing the motion, is such that reasonable people in a fair and impartial exercise of their judgment may reach different conclusions. *Estate of Davis v. Johnson*, 745 F.2d 1066, 1070 (7th Cir. 1984). This standard implies that a judgment notwithstanding the verdict should rarely be granted where the apparent correctness of the verdict turns on credibility determinations.

With these general principles in mind, we turn to the standards governing whether these defendants may be held liable for depriving plaintiff of rights secured under the eighth amendment. In *Estelle v. Gamble*, 429 U.S. 97 (1976), the Supreme Court held that deliberate indifference to prisoners' serious medical needs constitutes the unnecessary and wanton infliction of pain that is the hallmark of cruel and unusual punishment. *Id.* at 104. Since that case, this court has repeatedly recognized that the failure of institutional personnel to protect a prisoner from the assaults of other prisoners can also rise to the level of an eighth amendment violation. *See e.g., Estate of Davis v. Johnson*, 745 F.2d at 1071; *Little v. Walker*, 552 F.2d 193, 197 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978). Nevertheless, conduct that simply amounts to "mere negligence or inadvertence" is insufficient to justify the imposition of liability. *Estate of Davis v. Johnson*, 745 F.2d 1066 at 1070. Rather, "[i]n order to infer callous indifference when an official fails to protect a prisoner from the risk of attack, there must be a 'strong likelihood' rather than a 'mere possibility' that violence will occur." *Id.* at 1071 (quoting *State Bank of St. Charles v. Camic*, 712 F.2d 1140, 1146 (7th Cir. 1983)), *cert. denied*, 104 S. Ct. 491 (1984). "[A] guard does not have to believe to a moral

certainty that one inmate intends to attack another at a given place at a time certain before that officer is obligated to take steps to prevent such an assault." *State Bank of St. Charles v. Camic*, 712 F.2d at 1146 (quoting *VanCannon v. Breed*, 391 F. Supp. 1371 (N.D. Cal. 1975)). The failure to protect a prisoner on even a single occasion can give rise to liability where it can be inferred that an institutional employee should have realized that there was a "strong likelihood" of an attack.[2] *See Redmond v. Baxley*, 475 F. Supp. 1111, 1117 (E.D. Mich. 1979).

Each of the defendants argues that the evidence was insufficient to demonstrate that he or she was aware of a "strong likelihood" that Greaves would attack Watts; indeed, each claimed at trial to have no knowledge of any particular friction between the two boys, much less of the specific threats testified to by Watts. These defendants also stress, as they did before the trial court, the uncontested fact that Watts never told any of the defendants he was afraid of Greaves as a result of the threats, and argue that defendants therefore had no opportunity to take steps to protect him. Because the trial court reviewed the evidence relevant to these claims in some detail, we quote from its conclusions with respect to each defendant:

> *Althea Brown:* Watts testified that Brown was on duty one morning when the residents of Pierce Cottage lined up for breakfast. Watts ended up first in line. Greaves told Watts that Greaves went first because Greaves was in charge of the cottage. Greaves allegedly said, "'You're lucky [you're] a

[2] The defendants in this case do not challenge any of the instructions given at trial. They did not ask for an instruction requiring the victim to show that the defendants knew that the victim was at greater or more clearly defined risk than others in the institution, given the usual level of violence among inmates. They also did not ask for an instruction that would have made liability depend on some sort of notice or indication from the victim that there had been threats. We, of course, need not decide whether such instructions would have been appropriate and do not make any suggestions with regard to them.

shorty and one day you're going to get yours.'" Tr. (February 13, 1984) at 14-15.

Brown asserts that she never overheard this threat, in part because she was supervising twenty-eight residents. Nevertheless, the jury could have disregarded her testimony and inferred from Watts' testimony that she overheard the threat. Coupled with knowledge that gang loyalties led to violence in the facility, Brown could have known enough to show the necessary deliberate indifference. At trial, she testified that she was aware of no gang activity that went unpunished at St. Charles. She appeared knowledgeable in general, however, about gangs and their activities. Given the other reasonable testimony evidencing extensive gang activity at St. Charles and Brown's knowledge of gang behavior, her denials of gang activity may have rung hollow and undermined her credibility.

Geri Cejka: Watts testified that Cejka witnessed a fight between Watts and Greaves over a card game. Although Watts was hesitant and uncertain on cross-examination, he stuck to his story that Cejka was on duty and in the same room as Watts and Greaves during the argument. Cejka herself agreed that she disciplined both boys on another occasion for a similar argument.

When Cejka testified, Watts' counsel impeached her by reading from a letter in which she referred to Greaves as a "heavy." She wrote the letter shortly after the January 22nd incident, but the jury could have inferred that she based her opinion in the letter on activity that took place before the incident. Tr. (February 14, 1984) at 50. She explained that, by "heavy," she meant that Greaves was "bossy" and "wanted his way all the time." *Id.* at 49-51, 59-60. This statement by itself indicated that she considered Greaves to be overly aggressive. The jury could also have decided that "heavy" implied that Greaves was dangerous and that Cejka's belittling of this comment

hurt her credibility. If the jury believed Watts' story about Cejka's involvement, she clearly had enough knowledge to conclude that Greaves would give the "shorty" Watts "his."

James Laurent: Watts testified that Laurent was present for a threat that took place on the grass outside the cafeteria. Laurent argued that he was talking to students some distance away. In addition, Watts testified that he never told Laurent about the threat or about his fear of Greaves. Again, the jury could have reasonably concluded that, even though talking to other students, Laurent overheard the threat. Since Greaves was much larger than Watts, witnessing such a threat could have alerted Laurent to the danger Greaves posed to Watts.

Steven VanJoske: Plaintiff's testimony was that VanJoske was on duty during two of the alleged threats. For one of the threats, he was at the hospital with another resident. The jury could not conclude that he overheard this threat. During the second threat, he was present taking a head count of the Pierce Cottage residents. Although he claims he never overheard the threat, the jury could have inferred from Watts' testimony that VanJoske heard it.

Watts v. Peters, No. 82 C 4593 (N.D. Ill. July 2, 1984) (Mem. Opinion at 11-14).

It is clear from the summary of the evidence quoted above that reasonable people could have differed about whether each of the defendants had sufficient knowledge to realize that a "strong likelihood" of an attack existed. The plaintiff was apparently a credible witness, whose testimony if believed established that each of the defendants was an eyewitness on at least one occasion to an explicit threat made against Watts by Greaves. Moreover, the evidence taken in a light most favorable to plaintiff established that in evaluating the potential seriousness of that threat each defendant was armed with the knowledge that Greaves was physically much larger than Watts,

and that the two lived in the same cottage. Various testimony supported the inference that gang activity permeated the Youth Center and that Greaves was a gang leader while Watts resisted joining any gang. The defendants were directly responsible for observing and supervising residents' behavior, and they were in almost daily contact with both Watts and Greaves. Under these circumstances we agree with the trial court that the evidence was sufficient to demonstrate that defendants Laurent, Cejka, Brown and VanJoske knew there was a strong likelihood of an assault, and therefore the court did not err in refusing to grant a judgment notwithstanding the verdict.

The remaining defendant, Barry Steele, also was found liable by the jury, but this result was reversed by a judgment notwithstanding the verdict. Plaintiff contends that the trial court erred in setting aside the verdict because there was substantial evidence establishing that Steele had knowledge of the risk of harm to Watts posed by Derrick Greaves. Defendant Steele was a "Team Leader" at the Youth Center and was also in charge of supervising the Teen Center, a recreation area. As Team Leader, Steele was responsible for receiving disciplinary reports on residents. He presided over disciplinary hearings and decided whether a resident should be moved because of disciplinary infractions or for the resident's own protection. Steele had reviewed the master file on Derrick Greaves, and so knew that he had been transferred to the Youth Center because of behavior problems. Steele also knew Jeffrey Watts quite well, and, in fact, undisputed evidence indicates that Steele made a special effort to develop a relationship with Watts and to make sure Watts was getting along satisfactorily. Plaintiff argues that the court incorrectly reweighed the credibility of the witnesses in rejecting this testimony.

Even if all this evidence is accepted as fact, however, we agree with the district court that a jury could not reasonably conclude that Steele was aware of the risk to Watts but was deliberately indifferent to it. Steele's

responsibility for presiding over disciplinary hearings and for making disciplinary or protective segregation decisions establishes only that Steele probably had the power to protect Watts if he thought it necessary to do so. The essential question, however, is whether Steele had any reason to believe such steps were necessary. Plaintiff suggests that Steele could have gained knowledge about the risk to Watts from any one of several sources. In particular, "[t]he jury could have reasonably concluded that since Jeffrey [Watts] spoke with Barry Steele almost on a daily basis, the threats of harm were communicated [or that] since Barry Steele attended staffing meetings he received reports from each defendant concerning Greaves' behavior." Plaintiff's Br. at 34. Moreover, plaintiff contends Steele could have learned of the risk either from Derrick Greaves directly or from Greaves' master file.

While these possibilities are all quite adequate as hypotheses, however, they are insufficient as a basis for liability. Plaintiff presented absolutely no evidence that in any of their daily contacts he ever told Steele about the threats. Nor was there any testimony about what might have been communicated to Steele during staff meetings. The suggestion that Greaves might have announced to Steele his intention to attack Watts rather defies common sense, but, more important, there is no evidence to support it. Finally, there is no evidence that anything in Greaves' master file related to Greaves' hostility towards or altercations with Watts. In short, contrary to plaintiff's assertions, the problem is not that Steele denied knowledge of the risk; it is that Watts never presented evidence that Steele had such knowledge. The most that could be drawn from the plaintiff's evidence, viewing it in the light most favorable to him, is that Steele knew that Greaves had a history of behavior problems, that he was a gang chief, that he was a bully and had some disciplinary problems at the Youth Center. Steele presumably also knew that Watts was smaller than Greaves, was not a gang member and lived in the same cottage. Noticeably lacking, however, is any indication, as there was with the other defendants, that Steele knew of Greaves' particular ani-

mosity toward Watts or of the specific threats. Without such evidence we cannot see what might have prompted Steele to inquire further into the situation. Surely Steele was not responsible for segregating every gang bully with a history of misbehavior from every smaller non-gang member resident. In short, the jury could not infer from this evidence that Steele had knowledge of the risk. Thus the court properly granted the judgment notwithstanding the verdict as to defendant Steele.

III.

Surprisingly, the most difficult issue in this case relates not to liability but to damages: the parties sharply dispute what amount of damages the jury actually awarded to plaintiff. Throughout the trial, defendants were concerned that the jury might improperly find a defendant liable simply because he or she was joined with another defendant against whom the evidence was stronger. To counter this problem, the court stressed to the jury in its instructions that it should consider the case against each defendant separately. In particular, the court instructed the jury that:

> [A]lthough there is more than one defendant in this action, it does not follow from that fact that if one is liable that they are all liable. Each one is entitled to a fair consideration of his own defense and is not to be prejudiced by the fact . . . that you may find against one or more of the others. The instructions govern the case as to each defendant insofar as they're applicable to him or to her, to the same effect as if he or she were the only defendant in the case and . . . *you will decide each defendant's case separately as if it were a separate lawsuit.*

Defendant's Instruction No. 6, Tr., Vol. IV at 549-50 (emphasis added).

In addition to offering this instruction, defendants' counsel suggested that the court use separate verdict

forms for each defendant. The verdict form tendered by defendants contains a statement that "We, the jury, find for the plaintiff, Jeffrey Watts and against the defendant, [name of one defendant], and assess compensatory damages in the amount of $_____." The court agreed to use these forms over the objection of plaintiff, who stated that a general verdict form would be simpler. After trial, the jury returned verdicts in favor of plaintiff and against each of the individual defendants. On each individual verdict form, the jury filled in the amount "$40,000" in the blank left for compensatory damages. After the verdicts were rendered, a district judge (who was not the judge who had conducted the trial) entered judgment "for the plaintiff and against each of the defendants Althea Brown, Barry Steele, James Laurent, Geri Cejka, Steven VanJoske for compensatory damages in the sum of $40,000 as to each defendant individually." *Watts v. Peters*, No. 82 CR 4593 (N.D. Ill. February 17, 1984).

Ten days later, the defendants filed a joint motion to "clarify the judgment." They maintained that, although (under their interpretation) the district court had entered a judgment for the plaintiff in the total amount of $200,000, the jury had actually intended to award a total of $40,000 in damages against all of the defendants together. Plaintiff argued in response that the jury intended to award the plaintiff a total of $200,000 in damages, $40,000 assessed against each defendant separately. The district court judge who had heard the case decided in favor of defendants on this issue. Stressing that he had instructed the jury to consider each claim as if it were a separate lawsuit, the judge said he could

> read the verdicts in only one way .... As the jury considered each defendant, it concluded that a $40,000 award compensated Watts for his damage. For each verdict, the jury disregarded the other four defendants and decided what amount of money compensated Watts for his loss. In each case, the jury settled on a $40,000 award. The court will vacate its earlier order and enter a judgment against the defendants holding

> them jointly and severally liable for $40,000. Once Watts receives $40,000, the judgment will compensate him for his loss.

Watts v. Peters, No. 82 C 4593 (N.D. Ill. July 2, 1984) (Mem. Opinion at 6-7). The court thus vacated the earlier judgment and held that the defendants Brown, Cejka, Laurent and VanJoske "are together liable to Watts for no more than a total of $40,000. Each one, however, is liable to Watts for up to $40,000 until the judgment is satisfied." *Id.* at 26.

After plaintiff filed his notice of appeal, and the defendants filed their cross-appeal, plaintiff filed a "motion to supplement the record for appeal" in the district court. Watts wanted to supplement the record with the affidavits of two jurors who sat on the case; both stated that the jury determined that plaintiff was entitled to $200,000, $40,000 from each of the five defendants. The court denied the motion, explaining that under FED. R. APP. P. 10, the motion should be brought before this court. The court stated that since plaintiff neglected to offer the affidavits for the district court's consideration in response to defendants' motion to clarify the verdict, adding them to the record "adds nothing to the accuracy or completeness of the record." *Watts v. Peters*, No. 82 C 4593 (N.D. Ill. Nov. 8, 1984). Thereafter, plaintiff filed in this court a "Motion to Supplement Record on Appeal and for Relief under Circuit Rule 35(c)," which we must consider in the course of this opinion.

Plaintiff argues that it is plain from the face of the verdict forms that the jury intended to award plaintiff $40,000 from each defendant individually; and that this conclusion is made crystal clear by the instructions to the jury that it should consider the case against each defendant as if it were a separate lawsuit. Since, if each defendant had been tried separately, each would have been found individually liable for $40,000, plaintiff asserts, the jury merely followed its instructions and accomplished the same result as would have been accomplished after five

separate trials (total damages of $200,000) through the use of the separate forms. Defendants, on the other hand, contend that the forms indisputably show that the jury thought $40,000 was fair compensation for the plaintiff and awarded only this amount; since a single lawsuit against a single defendant would have yielded a $40,000 judgment as fair compensation, the fact that five defendants went to trial together should not mean the compensatory award should be increased fivefold. As noted, the trial court agreed with defendants, stating the verdicts could be read in "only one way." We feel compelled to comment that the only thing that seems "clear" about the jury verdicts is that they are ambiguous. Quite obviously, they can be interpreted in at least two ways, and the parties' simplistic assertions to the contrary are not helpful to this court.

There seems to have been some inadequacy in the theoretical development in this case. The trial court decided that the defendants were "jointly and severally liable" for the damages. Yet it permitted verdict forms to go to the jury that at least potentially allowed the jury to apportion damages among the various defendants. It appears to us that defendants' separate jury verdict forms were inherently ambiguous, and that the verdicts would have been open to question in any circumstance where the jury found more than one defendant liable. Thus, particularly in light of the outcome, we believe that the trial court erred in allowing those forms to be used.

Of course, the most obvious solution to our dilemma would be to remand the case for a new trial, at least on damages, using unambiguous verdict forms. Plaintiff has not requested this form of relief, however, and at oral argument repeatedly declined an opportunity to seek it (although he may not have clearly rejected it).[3] In any event, the whole colloquy with counsel quoted in the margin does not address specifically a new trial *limited to damages*. We have reserved until the end of this opinion

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[3] [Court]: I assume under any circumstances here you would not want a new trial?

(Footnote continued on following page)

consideration of the possibility of a new trial on damages as a possible remedy for a situation brought about in the first instance by defendants' request for ambiguous jury forms. Initially, however, we shall address the decision

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[3] *continued*

[Counsel]: Judge, I think the issues have been [indecipherable word] test by the jury. I think that . . . I think, uh, that the verdict is clear.

[Court]: I guess that I'm going back to the size of the verdict trial, you'd take the $40,000 rather than have a new trial?

[Counsel]: Judge, we were offered that option. We chose to appeal. If the . . . The court, quote, clarified the verdict from $200,000 to $40,000.

[Court]: Wouldn't another alternative be to remand this and have the jury . . . have a hearing, calling in the jury and ask . . .?

[Counsel]: Is there an option at this point? Uh, I don't know the necessity of it, judge, uh, because of the fact that—

[Court]: All right, [unintelligible].

[Counsel]: I assume that might be a possibility.

[Court]: If the only possibility were to retry the case, I take it you would not want that as a remedy?

[Counsel]: Well, I think that it would be a waste of judicial time, but I think . . . if, uh . . . .

[Court]: Well, I'm just asking whether you'd just take the $40,000 rather than a new trial?

[Counsel]: We choose not to, your Honor. We think that it is totally unjustified by the evidence.

[Court]: What's unjustified? You choose not to do what?

[Counsel]: We choose not to . . . we appealed immediately when the judge . . . Judge Decker entered his order, quote, clarifying the verdict from $200,000 to $40,000, we brought this appeal.

[Court]: Yes, I know you did. What I'm trying to figure out what is a proper remedy.

[Counsel]: What a proper remedy is . . . .

(Footnote continued on following page)

immediately put to us to choose between the parties' conflicting interpretations of the verdict forms used in the present trial.

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[3] *continued*

[Court]: One possibility is to retry the case.

[Counsel]: Well, uh.

[Court]: I'm not sure you want us to do that?

[Counsel]: There could be an evidentiary hearing as far as the jurors . . . that, uh, could be brought in as to their verdict? I'm sure that's a possibility.

[Court]: You already have people who said that they awarded $200,000.

[Counsel]: Pardon me?

[Court]: Jurors filed affidavits that they were awarding $200,000.

[Counsel]: Absolutely, and those are attached to the briefs.

[Court]: Why didn't you ask for clarification?

[Counsel]: There was no necessity, the verdict was clear. The remedy would have been under *Herrera v. Valentine.*

* * *

[Court]: You don't want a new trial, then?

[Counsel]: Your Honor, I don't think it's a necessity, judge. I think . . . I think the jury has spoken in this case.

Rebuttal: A new attorney speaking on plaintiff's behalf:

[Counsel]: The jury found the $200,000 in damages. Based on those verdict forms and based on their affidavits, we submit them. You have taken the Motion to Supplement the Record under advisement. If you don't consider them, uh, the only remedy is a new trial which would be no remedy at all.

[Court]: You don't want that as a remedy?

[Counsel]: No, your Honor.

[Court]: You don't want it. All right.

Plaintiff argues that since defendants created the problem by using the separate verdict forms over plaintiff's objection, any ambiguity should be construed against defendants. *See, e.g., Drollinger v. Merrell*, 57 Ill. App. 3d 792, 798, 373 N.E.2d 407, 412 (1978) ("While we realize that it is the function of the court to furnish the jury proper forms of verdict, parties cannot invite error by their conduct or inaction and later assign as error that which is so invited in the event the verdict of the jury is not to their liking.") At the very least, Watts insists, the defendants' failure to ask the court to order the jury to clarify its intention when the verdicts were rendered should be construed as a waiver of the argument that the jury meant to award only $40,000 total damages. There is some authority for this reasoning. For example, in *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981), the jury rendered a verdict for the plaintiff in the amount of $300,000. The jury was polled as to its verdict and then discharged. The defendants then sought to impeach the jury's verdict with the affidavits of two of the jurors, arguing that the verdict was irreconcilably inconsistent. The inconsistency apparently arose because the jury foreperson stated in response to a question by the trial court that the jury had only found violations of state law, while the verdict form itself indicated that only federal law violations had been found. The court said:

> The clerk read the verdict and the jurors were polled. There is nothing in the record to show that the appellants moved the court back into deliberations to cure any alleged defect in the verdict. After judgment had been entered, the appellants filed their motions for judgment notwithstanding the verdict and for a new trial. Included in these motions were *ex parte* affidavits of two jurors, the clear import of which was to impeach the jury's verdict . . . .
>
> If the appellants believed that the jury's verdict was unclear when rendered, the burden rested upon them to move the court, to order the jury back into

> deliberation. In our view, it is bad practice to wait until after the verdict is rendered and judgment is entered to reappear in court and attempt to impeach a verdict with affidavits that contradict their written verdict. *Cf. University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 547 & nn.42-43 (5th Cir. 1974).

Herrera v. Valentine, 653 F.2d at 1226-27 n.5.

Plaintiff argues that defendants' motion to clarify the verdict was the equivalent of the defendants' attempt to impeach the verdict in *Herrera*, and that the reasoning in that case should be applied here to prevent the defendants from disputing the plaintiff's conception of the jury's verdict. This approach is tempting, especially since here, unlike *Herrera*, the difficulty in the verdict arose not from a juror's spontaneous remark but from the defendants' drafting of the verdict form. However, in this case there is nowhere a simple determination of the total damages which we can uphold against impeachment. True, the fact that no explicit total appears is due to defendants' submission of forms that have no place for such a total. However, plaintiff compounded the error by failing to point out to the district court what problems might arise from defendants' proposed verdict forms. Plaintiff never objected on the basis that the separate forms would prevent the jury from explicitly assigning a total value to plaintiff's injury, or would create any ambiguity about damages. Rather, he merely stated that a general verdict

---

[4] The following colloquy occurred during the jury instruction conference regarding the use of the separate forms proposed by defendants:

> THE COURT: And there are a lot of separate verdicts here, verdict forms .... I'm not sure I'm going to give—is there a Not Guilty as to each one too?
>
> [DEFENDANTS' ATTORNEY]: That is correct.

(Footnote continued on following page)

reluctant to simply select the plaintiff's interpretation on the basis of waiver where the ambiguity may well not have been apparent to the defendants (or for that matter to plaintiff) until after a trial judge construed the verdicts as separate rather than joint and several.

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[6] *continued*

THE COURT: So it's one Guilty and one Not Guilty?

[DEFENDANTS' ATTORNEY]: Right.

* * *

[PLAINTIFF'S ATTORNEY]: I have a general verdict form for Guilty and Not Guilty.

THE COURT: You mean for all of them?

[PLAINTIFF'S ATTORNEY]: Yes.

THE COURT: I guess that's all right.

[DEFENDANTS' ATTORNEY]: Your Honor, we would prefer to have separate verdict forms for each party because I think there will be less confusion, and if the jury decides to find—

THE COURT: Tell me what the difficulty with a general one is if it applies across the board. If it's against—well, I think because of the damages involved and the separate people involved, I can't see any problem with this except the time in signing them.

[PLAINTIFF'S ATTORNEY]: If [defendants' attorney] is talking about simplification, the easy way is to make two verdict forms, two general ones.

THE COURT: I have done that and then the jury can be asked to insert the names and so forth and so on. I found out in a recent case there may be some confusion. I don't have any problem with this. Then each one will get some separate attention, which I guess they're each entitled to.

[DEFENDANTS' ATTORNEY]: That is what we would prefer.

Tr., Vol. III at 439-440.

Thus, our task remains to determine what the jury decided, based on its instructions and based on what the plaintiff conceives the task before the jury to have been. In making this determination we are guided by the parties' essential agreement that we should treat this case as if it consisted of five separate lawsuits, and by the legal principles that would govern recovery of damages in such a circumstance.

The linchpin of plaintiff's argument is his assertion that, had he brought five separate suits against the five individual defendants, each resulting in a $40,000 judgment, he would have been entitled to collect $40,000 from each of them for a total of $200,000. If this premise is correct, then we agree there is no reason plaintiff should be penalized for having joined all defendants in a single action (although of course the question whether the jury actually intended to award $200,000 here is a separate issue). If, on the other hand, five separate suits resulting in five $40,000 judgments would have yielded plaintiff only the right to collect a single $40,000 award, then the same logic dictates that plaintiff should not receive a windfall simply because all the defendants were present in a single trial.

This question in turn depends on whether or not these defendants were jointly and severally liable. Federal common law principles of tort and damages govern recovery under section 1983. *See Carey v. Piphus*, 435 U.S. 247 (1978); *Busche v. Burkee*, 649 F.2d 509, 518 (7th Cir.), *cert. denied*, 454 U.S. 897 (1981); *Keyes v. Lauga*, 635 F.2d 330, 336 (5th Cir. 1981). It is axiomatic that where several independent actors concurrently or consecutively produce a single, indivisible injury, each actor will be held jointly and severally liable for the entire injury. RESTATEMENT (SECOND) OF TORTS, §§ 875, 879; *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 & n.8 (1979). In such a case the injured party may proceed to judgment against any or all of the responsible actors in a single or in several different actions. *See* RESTATEMENT (SECOND) OF TORTS, § 882. However, the very nature of damages as

compensation for injury suffered requires that once the plaintiff has been fully compensated for his injuries by one or more of the tortfeasors, he may not thereafter recover any additional compensation from any of the remaining tortfeasors. *See* RESTATEMENT (SECOND) OF TORTS, § 885(3) and comment e, § 886 and comment a. *See also Dundee Cement Co. v. Howard Pipe and Concrete Products, Inc.*, 722 F.2d 1319, 1324 (7th Cir. 1983); *Whitehurst v. Charles Town Hospital*, 626 F.2d 357 (4th Cir. 1980).

Thus, if in this case each defendant's independent actions (or failure to take action) produced a single, indivisible injury, and if a lawsuit against any one defendant would have produced a compensatory judgment of $40,000, then the fact that plaintiff might have obtained five such judgments would mean only that those five defendants would be jointly and severally liable for $40,000, *not* that plaintiff could obtain satisfaction with respect to all the judgments for a total award of $200,000. Unfortunately, plaintiff has failed to make his position on this point clear to the court. His briefs refer in passing to the fact that the verdict forms do not mention joint and several liability, but this circumstance does not seem to meet the central issue of what theory plaintiff relied on. At oral argument, plaintiff's attorney was asked how the verdict would be affected if this court were to affirm the grant of judgment notwithstanding the verdict in favor of defendant Steele. He responded that the $200,000 verdict should be reapportioned among the remaining four defendants, a proposition that is more consistent with a theory of joint and several liability than with a theory that the $40,000 judgments corresponded to separate, divisible injuries.

Our search of the record discloses little in the plaintiff's evidence, argument or proposed jury instructions to indicate that he ever took the position that his injury was in any way divisible, such that the jury could have apportioned damages according to the degree or type of injury each defendant caused. In reviewing the instructions for the jury during closing argument, plaintiff's attorney told

the jury that it would be given verdict forms on which it would identify "an amount of damages" and that it would be up to the jury "to decide on those forms how to apportion the damages among the various defendants." Assuming this reference to apportionment was more than inadvertent, we are at a loss to see on what theory or evidentiary basis the jury was to have made such a determination. Plaintiff never argued that any defendant was more or less culpable (or that they were all equally culpable) for his injuries. Plaintiff never proposed separate damage figures for each defendant, but merely suggested that $150,000 might be appropriate compensation for plaintiff's injuries. In response to the court's questions at oral argument, plaintiff's attorney was unable to offer any justification for segregating damages to correspond to harm that each defendant caused. He merely stated that the jury must have found each defendant equally culpable.

In the absence of any suggestion to the contrary, we must conclude that plaintiff suffered a single, indivisible injury. The nature of the case appears to be such that each defendant's failure to protect plaintiff would have caused plaintiff's injury independently of the other defendants' failure to act, but the injury itself—the attack by Greaves—cannot be apportioned in any sensible way among the several defendants. Thus, this seems to be a classic case for imposing joint and several liability.

If this is correct, then it would make no difference whether plaintiff obtained a separate judgment against each defendant in five separate suits, or obtained five "separate" judgments against the defendant in a single suit. In either event, plaintiff is only entitled to receive from the five defendants jointly the same amount that he could receive from any single defendant individually. Thus, since plaintiff concedes (indeed insists) that a single suit against any individual defendant would have produced a judgment in the amount of $40,000 as fair compensation for his injuries, he is only entitled to receive $40,000 from all of the defendants, jointly and severally.

In short, the amount of damages necessary to compensate plaintiff for his injury is the essential first step determination; in this sort of case additional judgments against additional defendants merely provide additional sources of collection, not an enhanced standard of compensation.

Applying these principles to the question of what decision the jury reached, plaintiff could argue (although he has not) that the verdict is properly construed as joint and several, but it is in the amount of $200,000. There are several problems with this approach. First, it is inherently inconsistent with plaintiff's argument that a suit against a single defendant would have yielded a $40,000 judgment. As previously stated, if $40,000 was sufficient compensation for plaintiff's injuries, there is no basis consistent with joint and several liability for allowing a $200,000 judgment merely because additional defendants were joined. For the same reason, if the jury in fact first decided that $200,000 was appropriate compensation, but then apportioned that amount among the several defendants, such apportionment would violate the premise of joint and several liability for a single indivisible injury.

Most important, we would have to assume the jury disregarded its instructions. The jury was not instructed to reach a damage figure and then divide it up among the defendants it had found liable. Rather, it was instructed to consider each defendant's case as if it were a separate lawsuit, disregarding the others. If it followed these instructions, we would expect the result that occurred: the amount necessary to compensate the plaintiff was determined to be the same for each defendant. Under this analysis, what the jury might have believed after it reached its separate verdicts about whether or not the judgments would be aggregated is largely irrelevant, just as it would be in a lawsuit against a single defendant where the jury might be aware that other defendants had been or could be sued in separate actions.[5]

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[5] Plaintiff asks us to consider the affidavits of two jurors which indicate the view that the jury intended to award $200,000.

(Footnote continued on following page)

This is a difficult and unusual case, and its proper resolution is by no means "clear." Nevertheless, because we cannot accept plaintiff's argument without assuming that the jury disregarded its instructions, and without doing violence to accepted principles of joint and several liability, we decline to do so. Nonetheless, we are aware that it was the defendants' initiative which led to the confusion, the effects of which cannot be entirely dispelled no matter how rigorous the after the fact analysis. We can never know with certainty as a matter of fact what was the intention of the original jury and the ultimate responsibility for this must be laid at defendants' feet.

We are, therefore, in the interests of justice prepared to offer the plaintiff a new trial on damages, which he may accept or reject at a time and in a manner to be specified

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[5] *continued*

Defendants insist that we should not consider the affidavits on appeal since they were not offered for the district court's consideration prior to the ruling on the defendants' motion for clarification, but only in a motion to supplement the record. *See United States v. Gray*, 611 F.2d 194 (7th Cir. 1979), *cert. denied*, 446 U.S. 911 (1980). This case may be somewhat different, however, since plaintiff arguably seeks to use the affidavits in a defensive rather than offensive way. Regardless of the propriety of adding the affidavits to the record on appeal, there is a more fundamental problem which persuades us not to consider them. At best, the affidavits inform us about the perceptions of two out of six jurors; we have no way of knowing whether these are representative of the other jurors' views about the meaning of the verdict. We think if affidavits (or live testimony) were to be used as a method for resolving the ambiguous verdicts, all (or substantially all) of the jurors would have to be heard from in order for this effort to be probative. And, the jury's expectation, if it existed, that plaintiff was entitled to $200,000 because it had established the liability of five defendants does not justify an award in that amount where the jury had apparently determined that $40,000 was the amount sufficient to compensate the plaintiff in separate suits against the individual defendants.

by the district court on remand. We are not unaware of the possibilities for injustice inherent in new trials devoted only to damages. *See Gasoline Products Co. v. Champlin Refining Co.*, 238 U.S. 494, 499-500 (1931); *MCI Communications Corp. v. A.T.&T. Co.*, 708 F.2d 1081, 1166-68 (7th Cir. 1983). We therefore specify conditions which we believe will avoid, or at least minimize, the problems inherent in a procedure whereby a new jury addresses damage questions without knowledge of the evidence introduced in the liability phase of the trial. We therefore require that the parties shall have an opportunity to present to the second jury whatever evidence (through testimony, in summary form or as the district court shall permit) from the liability phase of the trial may be regarded as relevant in any way to the question of damages. To the extent that the parties may be able to stipulate to evidence or summaries of evidence from the liability phase, the proceeding will, of course, be expedited. The trial judge shall apply a broad standard with respect to the relevance of this sort of evidence and there shall be a strong presumption that evidence from the liability phase may be relevant in some way to damages.

The new jury shall be instructed that the relevant issues of liability have been previously decided and shall be instructed as to the legal basis of defendants' liability. These instructions shall not, however, preclude the free presentation of evidence and information from the liability phase to the extent such evidence is relevant, as indicated above, in any way to damages. Should the plaintiff elect to pursue a new trial on damages, he of course agrees to relinquish any claim to the $40,000 awarded by the first jury.[6]

The judgments against defendants Laurent, Cejka, Brown and VanJoske are therefore AFFIRMED as to liabil-

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[6] Both parties and their counsel should be aware of the possible questions involving attorneys' fees in the event of a new trial on damages. *See Marek v. Chesny*, 105 S.Ct. 3011 (1985); *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

ity and, unless the plaintiff shall elect to proceed to a new trial on damages as provided in the opinion, these defendants shall be jointly and severally liable for $40,000. The judgment notwithstanding the verdict for defendant Steele is AFFIRMED. The plaintiff's motion to enlarge the record on appeal is denied. The question of damages is remanded to the district court. If the plaintiff shall elect to undertake a new trial on damages, that proceeding shall be conducted in accordance with this opinion, and the present conditional award of $40,000 shall be vacated. If the plaintiff shall elect to forgo a new trial on damages, the judgment for $40,000, as specified above, shall stand AFFIRMED. Circuit Rule 18 shall not apply.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JEFFREY WATTS,

Plaintiff,

No. 82 C 4593 vs.

HOWARD PETERS, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

On January 22, 1982, Jeffrey Watts (Watts) suffered a severe injury to his left leg and hip while an inmate at the Illinois Youth Center located in St. Charles, Illinois (IYC-St. Charles or St. Charles). He brought this suit under 42 U.S.C. §1983 (section 1983) alleging that several state employees who worked at IYC-St. Charles violated his right to be free from cruel and unusual punishment. The complaint asserted that another inmate, Derrick Greaves (Greaves), attacked Watts and that defendants were deliberately indifferent to the danger of the attack.

After a four-day trial, a jury returned five separate verdicts, one against each defendant in the amount of $40,000. Defendants move for clarification of the judgment and for a judgment notwithstanding the verdict or, in the alternative, a new trial.

I. *Factual Background*

Watts arrived at IYC-St. Charles on July 21, 1981. Approximately three to four hundred youth criminal offenders live there. At the time, he had just turned fifteen and weighed between 120 and 130 pounds. Watts testified at

trial that, after he arrived, he learned that many of the inmates considered themselves members of gangs. These gangs allegedly held meetings, recruited new members, and communicated with hand signals. Watts asserted throughout trial that he never joined a gang although several tried to recruit him.

Derrick Greaves arrived at St. Charles on November 25, 1981. Officials transferred Greaves to IYC-St. Charles from the minimum security prison at Valley View, Illinois because of his aggressive behavior at Valley View. IYC-St. Charles is designated a medium/maximum security facility. In late 1981 and early 1982, Greaves was about 5′ 7″ tall and weighed approximately 155 pounds. Testimony at trial indicated that Greaves considered himself "chief" of the Black Gangster Disciples, one of the gangs at IYC-St. Charles.

The residents of IYC-St. Charles live in cottages. When residents arrive, administrators assign them to a cottage according to their disposition and background. One of these cottages, Roosevelt Cottage, is a higher security building used to segregate difficult residents. Watts and Greaves lived in Pierce Cottage.

Employees called youth supervisors oversee the residents. These youth supervisors take regular head counts, conduct residents to and from meals and classes, record daily logs reflecting each resident's behavior, and administer discipline. Four of the five defendants, Althea Brown (Brown), Geri Cejka (Cejka), James Laurant (Laurant), and Steven Vanjoske (Vanjoske), served as youth supervisors during the period relevant to Watts' complaint. The fifth defendant, Barry Steele (Steele), acted as a "team leader" in charge of supervising the Teen Center, a recreational facility for the residents.

On January 22, 1982, the residents of Pierce Cottage assembled outside the cafeteria after lunch. Brown and Vanjoske were taking a head count before leading the residents back to the cottage. The testimony at trial conflicted about what happened next. Several residents began

running over the field between the cafeteria and Pierce. Watts was running across the field when he suddenly found himself on the ground with Greaves on top of him. Testimony indicated that Greaves got up and "growled" while Watts writhed in pain on the ground. An ambulance took him to the hospital. Watts claimed that Greaves attacked him; defendants argued that Watts slipped on ice.

The theory of plaintiff's case was that Greaves had threatened Watts at least four times before January 22, 1982 and that, although aware of these threats, the defendants took no action to protect Watts. The four defendants other than Barry Steele overheard disputes between Watts and Greaves in which Greaves referred to Watts as a "shorty" who "would get [his] . . . one day." Transcript (February 13, 1984) at 15 [hereinafter Tr.]. Steele supposedly became aware of the danger to Watts through his knowledge of Greaves' record, his opportunity to observe Greaves' behavior, and his recognition that Watts was smaller than other residents. Steele testified that he repeatedly asked Watts about how Watts was getting along and that Watts never appeared fearful. The defendants maintained that they were unaware of any extraordinary animosity between Watts and Greaves.

At trial, all the defendants, the plaintiff, and many other witnesses testified. Throughout trial, defendants' counsel emphasized that the jury must consider each defendant separately. The jury had to determine that each of the five defendants showed the deliberate indifference that created liability. Accordingly, the court modified instructions and provided the jury separate verdict forms to ensure that the jury evaluated each defendant separately.

II. *Discussion*

A. *Motion to Clarify Judgment*

Before the court determines whether it should overturn the jury verdicts, it must decide what the verdicts mean. The motion to clarify judgment raises two issues. The motion argues both that the jury meant only to award a total

of $40,000 and that, if the jury meant to award $200,000, the award was excessive. Defendants contend in the second case that the excessiveness of the award requires the court to interpret the jury verdicts as only awarding a total of $40,000. Whether the verdicts were excessive is an issue about whether the evidence was sufficient to support them. The court discusses the sufficiency of the evidence in its disposition of the judgment notwithstanding the verdict.

With respect to the first argument, the court remained cognizant throughout trial that the jury might find liability against a defendant because the defendant was joined with another who was liable. To counter this problem, the court explained to the jury how it had to consider each defendant separately. In particular, the court told the jury:

> Although there is more than one defendant in this action, it does not follow from that fact that if one is liable, all are liable. Each is entitled to a fair consideration of his own defense and is not to be prejudiced, by the fact, if it should become a fact, that you find against the others. The instructions govern the case as to each defendant, insofar as they are applicable to him, to the same effect as if he were the only defendant in the action, and regardless of whether reference is made to defendant or defendants, in the singular or plural form. You will decide each defendant's case separately as if each were a separate lawsuit.

See Defendants' Instruction No. 6.

In addition to offering this instruction, defendants' counsel suggested the use of separate jury verdicts. The court gave the jury separate verdict forms over the protestation of plaintiff's counsel that a general verdict for all defendants would be simpler. Tr. (Jury Instruction Conference) at 7. The court observed that "[t]hen each one will get some separate attention, which I guess they're each entitled to." *Id.* Ms. Black, one of defendants' two attorneys responded, "That is what we would prefer." *Id.*

Given this background, the court can read the verdicts in only one way. The court told the jury to consider each claim as if it were a separate lawsuit. The court reiterated that "[t]he instructions govern the case as to each defendant . . . to the same effect at if he were the only defendant in the action." With this directive, the court told the jury to disregard the other defendants and focus on each one individually and separately. As the jury considered each defendant, it concluded that a $40,000 award compensated Watts for his damage. For each verdict, the jury disregarded the other four defendants and decided what amount of money compensated Watts for his loss. In each case, the jury settled on a $40,000 award. The court will vacate its earlier order and enter a judgment against the defendants holding them jointly and severally liable for $40,000. Once Watts receives $40,000, the judgment will compensate him for his loss.

B. *Judgment Notwithstanding the Verdict*

Defendants move for judgment notwithstanding the verdict for many different reasons. Defendants' arguments fall into five categories:

(1) As a matter of law, defendants' failure to protect Watts amounted, at most, to negligence outside the scope of §1983.

(2) The evidence failed to support Watts' contention that defendants were aware of the safety threat posed by Greaves.

(3) The evidence failed to support the size of the jury verdict.

(4) The court erred by admitting evidence of gang activity at IYC-St. Charles.[1]

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[1] The court fails to see how it can enter judgment notwithstanding the verdict because it erred in admitting evidence or instructing the jury. A new trial motion would be more appropriate. Never-

(Footnote continued on following page)

(5) When the court instructed the jury, it overemphasized damages, failed to give a good faith instruction, and misstated the law regarding knowledge and intent.[2]

"[A] court should sparingly enter judgments n.o.v." *Clemons v. Mitsui O.S.K. Lines*, 596 F.2d 746, 748 (7th Cir. 1979), *cert. denied*, 451 U.S. 969 (1981); *See F.W. Hempel & Co. v. Metal World*, 721 F.2d 610, 613 (7th Cir. 1983). "[A] motion for judgment notwithstanding the verdict . . . 'should be denied where the evidence, along with [the] inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion, is such that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions.' " *Clemons*, 596 F.2d at 748 (quoting *Hohmann v. Packard Instrument Company*, 471 F.2d 815, 819 (7th Cir. 1973)). This standard implies that the court should avoid basing a judgment notwithstanding the verdict on a disagreement with the jury about credibility. *See Clemons*, 596 F.2d at 748.

1. *Standard of Fault*

Cases involving a failure to protect trace their roots to *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), in which the Supreme Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . proscribed by the Eighth Amendment." *See, e.g., State Bank of St. Charles v. Camic*, 712 F.2d 1140, 1145-46 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 491 (1984); *Little v. Walker*, 552 F.2d 193, 197 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978). "[T]he

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[1] *continued*
theless, since defendants raised these grounds in their judgment n.o.v. motion, the court discusses the issues in this portion of the opinion. The court, however, applies the standards governing new trial motions discussed on pages 25-26.

[2] *See supra* note 3.

'deliberate indifference' standard of *Estelle* is met only if there were a strong likelihood, rather than a mere possibility, that violence would occur." *Camic*, 712 F.2d at 1146. " '[A] guard does not have to believe to a moral certainty that one inmate intends to attack another at a given place at a time certain before that officer is obligated to take steps to prevent such an assault.' " *Id.* (quoting *Vun Cannon v. Breed*, 391 F. Supp. 1371 (N.D. Cal. 1975)). " 'But, on the other hand, he must have more than a mere suspicion that an attack will occur.' " *Camic*, 712 F.2d at 1146. "[E]ven though Section 1983 embodies no state of mind requirement, . . . the Eighth Amendment does." *Id.* (citations omitted).

An isolated assault can constitute a deprivation of eighth amendment rights if guards have enough information to realize that an attack is likely to occur. For example, in *Redmond v. Baxley*, 475 F. Supp. 1111, 1114-15, 1116-17 (E.D. Mich. 1979), three inmates threatened a diabetic prisoner staying in the hospital infirmary. He reported these threats to infirmary personnel. The personnel ignored the repeated threats. Hours later, the inmates raped the plaintiff. Evidence indicated that several defendants had been aware of how pervasive homosexual rape was in the prison.

A jury awarded $130,000, and the district court refused to vacate the award. The court held that "[i]f the defendants' conduct is flagrantly culpable, then the mere failure to protect an inmate on a *single occasion* can constitute a deprivation of constitutional rights giving rise to a claim under §1983." 475 F. Supp. at 1117. "The import of pervasive prison violence is that such circumstances would be a basis to infer knowledge, and thus culpability, on the part of a defendant prison official." *Id.*

Applying these principles to the evidence presented, the court cannot find that Watts' claim fails as a matter of law. The defendants allegedly knew of the existence of gangs at St. Charles and, in particular, knew either that Greaves threatened Watts or was so aggressive that the

danger of attack was great. Knowing these facts, the defendants, as a matter of law, could have known enough to be on notice that Greaves posed a serious threat to Watts' safety. If aware of these facts, defendants' inaction could have been more than negligent.

2. *Sufficiency of the Evidence on Liability*

Most of defendants' memorandum in support of these motions is an elaborate argument that the jury made a mistake in evaluating whose story was more believable. With respect to the defendants other than Barry Steele, the memorandum argues that none of the four defendants could have overheard the threats because they were too far away or were occupied with other chores. Barry Steele supposedly should escape liability because he had no way of knowing about the threats. In addition, plaintiff never complained to any defendant about the threats to his safety.

With respect to the verdicts against Brown, Cejka, Laurant, and Vanjoske, the court cannot substitute its judgment for that of the jury. Watts introduced enough evidence from which the jury could reasonably infer that each of these four defendants knew of Greaves' animosity towards Watts and Greaves' intentions to get Watts:

Althea Brown: Watts testified that Brown was on duty one morning when the residents of Pierce Cottage lined up for breakfast. Watts ended up first in line. Greaves told Watts that Greaves went first because Greaves was in charge of the cottage. Greaves allegedly said, " 'You're lucky your a shorty and one day you're going to get yours.' " Tr. (February 13, 1984) at 14-15.

Brown asserts that she never overheard this threat, in part because she was supervising twenty-eight residents. Nevertheless, the jury could have disregarded her testimony and inferred from Watts' testimony that she overheard the threat. Coupled with knowledge that gang loyalties led to violence in the facility, Brown could have known enough to show the necessary deliberate indiffer-

ence. At trial, she testified that she was aware of no gang activity that went unpunished at St. Charles. She appeared knowledgeable in general, however, about gangs and their activities. Given the other reasonable testimony evidencing extensive gang activity at St. Charles and Brown's knowledge of gang behavior, her denials of gang activity may have rung hollow and undermined her credibility.

Geri Cejka: Watts testified that Cejka witnessed a fight between Watts and Greaves over a card game. Although Watts was hesitant and uncertain on cross-examination, he stuck to his story that Cejka was on duty and in the same room as Watts and Greaves during the argument. Cejka herself agreed that she disciplined both boys on another occasion for a similar argument.

When Cejka testified, Watts' counsel impeached her by reading from a letter in which she referred to Greaves as a "heavy." She wrote the letter shortly after the January 22nd incident, but the jury could have inferred that she based her opinion in the letter on activity that took place before the incident.[3] Tr. (February 14, 1984) at 50. She explained that [illegible] "heavy," she meant that Greaves was "bossy" and "wa[illegible] his way all the time." *Id.* at 49-51, 59-60. This statement by itself indicated that she considered Greaves to be overly aggressive. The jury could also have decided that "heavy" implied that Greaves was dangerous and that Cejka's belittling of this comment hurt her credibility. If the jury believed Watts' story about Cejka's involvement, she clearly had enough knowledge to conclude that Greaves would give the "shorty" Watts "his."

James Laurant: Watts testified that Laurant was present for a threat that took place on the grass outside the cafeteria. Laurant argued that he was talking to students some distance away. In addition, Watts testified that he

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[3] The court refused to admit the letter into evidence, but allowed counsel to use it for impeachment purposes. *E.g.*, Tr. (February 14, 1984) at 54.

never told Laurant about the threat or about his fear of Greaves. Again, the jury could have reasonably concluded that, even though taking to other students, Laurant overheard the threat. Since Greaves was much larger than Watts, witnessing such a threat could have alerted Laurant to the danger Greaves posed to Watts.

Steven Vanjoske: Plaintiff's testimony was that Vanjoske was on duty during two of the alleged threats. For one of the threats, he was at the hospital with another resident. The jury could not conclude that he overheard this threat. During the second threat, he was present taking a head count of the Pierce Cottage residents. Although he claims he never overheard the threat, the jury could have inferred from Watts' testimony that Vanjoske heard it.

All defendants argue that Watts never told them about the threats. The Constitution imposes no requirement that a prisoner complain to his captors to put them on notice. The circumstances surrounding a prisoner's captivity can alert guards to a danger more forcefully than the prisoner himself. In this case, Watts contended that he was not afraid to fight Greaves, but he always sensed that he had "to watch [his] . . . back against [Greaves]." Tr. (February 13, 1984) at 46. The testimony impressed the court that residents are reluctant to admit fear because such admission will show weakness and compromise a resident's respect among his fellow inmates. This reluctance will not conjure up section 1983 liability without other warnings to prison guards, but it reasonably explains silence in the face of threats.

The verdict against Barry Steele is different. He is the one defendant who had no opportunity to overhear the alleged threats. He served as a team leader in charge of overseeing the central recreation facility at IYC-St. Charles. In this position, he had access to residents' disciplinary files and had authority to segregate dangerous residents. Testimony indicated that Steele took a particular interest in Watts because Steele noticed that Watts was smaller than other residents.

Watts contended that, because of Steele's duties and responsibilities, familiarity with gang activity, and Watts' smaller size, Steele was aware of the danger to Watts. The record lacks evidence about whether Steele knew that Watts resisted joining a gang. Steele, however, acknowledged Watts' smaller size. Steele had daily contact with almost all the residents.

Based on the record, the court must vacate the jury verdict and grant Steele a judgment notwithstanding the verdict. The record lacks any evidence that Steele knew about Greaves' dislike for Watts. Steele had no indication from Watts himself or from threats or disciplinary records that Greaves was out to get Watts. Both Steele and Watts testified that Steele asked Watts several times about how he was adjusting to St. Charles. In fact, Steele took a particular interest in Watts because Steele was concerned about his smaller size. In contrast to the deliberate indifference required under *Estelle*, Steele took steps to see if Watts needed more help. Given this interest and Steele's inquiries, he still had no reason to consider Greaves a threat to Watts. Plaintiff introduced nothing that indicates Greaves' disciplinary file contained enough information to notify Steele of a danger to Watts. Without something alerting Steele to a threat to Watts, the jury's verdict lacks support.

The court granted a directed verdict in favor of another defendant, Barbara Frederiksen, who was also in an advisory role. The court directed a verdict because she had no reason to know that Watts was in danger. Similarly, Steele, even with his more personal relationship with Watts, had no notice of a threat. The court concludes that it should have granted a directed verdict for Steele and now grants his a judgment notwithstanding the verdict.

3. *Sufficiency of the Evidence on Damages*

Defendants argue that a total judgment of $200,000 would be excessive, unreasonable, and unsupported by the evidence. Considering the court's interpretation of the ver-

dicts, it need only consider whether the evidence supported a $40,000 judgment. Throughout this case, defendants' counsel agreed that a serious injury occurred. They offered no evidence on the issue of damages.

Once liability is established, a proper damage award should compensate plaintiff for losses caused by the violative acts. *See, e.g., Redmond*, 475 F. Supp. at 1121-22, Defendants' Jury Instruction No. 25. Watts and other witnesses testified about the extreme pain that he experienced after the accident. A physician who treated Watts detailed the permanent damage to the hip joint and the limited prospects of corrective surgery. Watts described his life at home and how the injury disrupted his family life. Given that the injury permanently and severely impaired a fifteen year old's ability to walk and run, the court finds that a $40,000 judgment is reasonable.

4. *Evidence of Gang Activity*

Defendants assert that the court erred by admitting evidence about gang activity because nothing indicates that the attack was gang-related. This argument fails. The existence of gangs and pervasive gang activity could contribute to defendants' awareness of a danger of violence. *See Redmond*, 475 F. Supp. at 1117.

In addition, evidence indicated that the attack could have been gang-related. Greaves considered himself a gang chief. Watts' independence undermined his authority. Watts testified that he never joined a gang and that he challenged Greaves' authority in food lines when Greaves considered himself to be the person who ran the cottage. Tr. (February 13, 1984) at 14-15. Greaves testified that "Jeff Watts was messing with some of [his] . . . folks." Tr. (February 14, 1984) at 20.[4] The defendants allegedly

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[4] Greaves testified as follows:

Q: Did you make any threats to Jeffrey Watts prior to January 22, 1982?

(Footnote continued on following page)

heard threats that resulted from Greaves dislike of Watts. Gang related problems may have fueled this dislike. The evidence of gang activity was therefore relevant to whether Greaves ever threatened Watts.[5]

Defendants also assert without citation that the court admitted evidence that Greaves was disciplined over twenty times after the incident. The court attempted to exclude all evidence of Greaves' behavior after the incident. *E.g.*, Tr. (February 13, 1984) at 11, 17, 20, 22. At one point, the court chastised plaintiff's counsel for trying to offer evidence about post-incident conduct. Tr. (February 14, 1984) at 3-4. The court is unaware of any evidence actually admitted about Greaves' post-incident disciplinary record. Without documentation, defendants' assertion fails.

5. Jury Instructions

Defendants object to two of the court's damage instructions. Plaintiff's Instructions No. 7 and No. 8 dealt with damages as did Defendants' Instruction No. 24A. Defen-

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[4] *continued*

A: No, sir.

Q: You never had an argument with him?

A: Slight confrontation.

Q: What's a slight confrontation?

A: He was in the hallway and the problem was Jeff Watts was—at the time when I was—Jeff Watts was messing with some of our folks and they came back to me and they told me what was going on and they told me they was going to move out on Jeff Watts. I told them, "Don't do that. Just keep a cool head. I'll talk with him."

Tr. (February 14, 1984) at 20.

[5] Also, defendants contended that the incident on January 22, 1982 was an accident, but Watts asserted that Greaves attacked him. Watts claimed that his independence threatened Greaves' authority. Therefore, to help it determine whether Greaves attacked Watts, the jury properly heard evidence about gang activity.

dants argue that the court overemphasized damages when it gave all three of these instructions and encouraged the jury to bestow a windfall on plaintiff. Plaintiff's Instruction No. 7 discussed what standards the jury could use to calculate damages. At the instruction conference, defendants' counsel objected to Plaintiff's Instruction No. 7 because it failed to explain that a defendant had to cause the damage. Tr. (Jury Instruction Conference) at 13, 24. The court noted that another instruction cured this problem, *see* Defendants' Instruction No. 24, and counsel agreed to Plaintiff's Instruction No. 7. *See* Tr. (Jury Instruction Conference) at 13.[6]

The court gave Plaintiff's Instruction No. 8 in addition to Defendants' Instruction No. 24A because the latter instruction failed to fully explain the elements of damage for which the jury could compensate Watts.[7] Therefore, the damage instructions were not repetitive.

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[6] The record reads:

> THE COURT: 6 given. 7.
>
> Well, this instruction—let me hear from counsel for the defendants.
>
> MS. BLACK: Just a moment, your Honor.
>
> THE COURT: Are you objecting or not?
>
> MS. BLACK: I think we would object unless it were modified by adding the statement that they have to find the defendants caused injury before they award damages.
>
> THE COURT: There is an instruction to that effect, or there will be. There is one, "Unless you find liability you will have no occasion for damages."
>
> MS. LISCHER: That's in ours.
>
> THE COURT: You have no objection otherwise, right? Given, if that's the case.
>
> Plaintiff's 8 . . .

Tr. (Jury Instruction Conference) at 13.

[7] The record also lacks any indication that counsel objected to Plaintiff's Instruction 8. *Compare* Tr. (Jury Instruction Conference) at 13-14 with *id.* at 20. Therefore, even if the instructions were repetitive, defendants waived their objection.

Next, defendants object to Plaintiff's Instruction No. 4. The court proposed to give the instruction as follows:

> The means of knowledge are ordinarily the equivalent in law to knowledge. So, if it appears from the evidence in the case that a person had information which would lead a reasonably prudent person to make inquiry through which he would usually learn certain facts, then this person may be found to have had actual knowledge of those facts, the same as if he had made such inquiry and had actually learned such facts.
>
> That is to say, the law will charge a person with notice and knowledge of whatever he would have learned, upon making such inquiry as it would have been reasonable to expect him to make under the circumstances.
>
> Knowledge of notice may also be established by circumstantial evidence. If it appears that a certain condition has existed for a substantial period of time, and that the Defendants had regular opportunities to observe the condition, then you may draw the inference that he had knowledge of the condition.
>
> However, in any case, you must reach the conclusion that the information did in fact reach the defendant involved.

The court added the last sentence after defendants' counsel objected to the instruction. Tr. (Jury Instruction Conference) at 12. Regrettably, when the court read the instructions to the jury, it omitted the last sentence. Defendants' counsel alerted the court to its error. The court reconvened the jury and read the correct instruction to the jury with the admonition that they should not give undue emphasis to any instruction or portion of one, in particular to the added sentence. Defendants' counsel then made no objection.

With the added sentence, the instruction clarifies that, ordinarily, constructive knowledge is enough and circum-

stantial evidence can establish knowledge but that, in this case, the jury had to find actual knowledge. Evidence of constructive knowledge or circumstantial evidence of knowledge is probative if other evidence establishes that the defendant did in fact receive the information. Plaintiff's Instruction No. 4 (modified). The court remains convinced that this is a correct statement of the law.[8]

The court's admonition reduced the risk of prejudice from the initial omission of the last sentence. More important, during their deliberations the jury received copies of the instructions. Defendants' counsel reviewed the instructions before the jury received them and entered no objection. With the written instructions before them, it is unlikely that the jurors gave any one instruction undue emphasis. At most, the omission was harmless error.

Defendants object to Plaintiff's Instruction No. 10. That instruction provided:

> The fact that a Defendant or Defendants had no specific intent or purpose to deprive the Plaintiff of his civil rights will not absolve the Defendant or Defendants from liability if they did in fact deprive the Plaintiff of those rights.

This instruction explained to the jury that, to find liability, it did not have to conclude that the purpose of defendants' inaction was to deprive Watts of his constitutional rights.

As explained in *Redmond*, a prison guard does not have to intend to deprive a person of his constitutional rights. 475 F. Supp. at 1118. Reckless conduct is enough. *Id.* "[D]eliberate indifference may involve taking risks, rather than intending results." *Id.* The court in *Westlake v. Lucas*, 537 F.2d 857, 860 n.3 (6th Cir. 1976), stated that

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[8] The only claim that depended on a theory of constructive knowledge was the one against Barry Steele who had access to disciplinary files. The other defendants all allegedly had actual knowledge of the threat to Watts. Since the court grants Steele judgment, any error associated with this instruction was harmless.

"[a] complaint need not allege that prison officials consciously sought to inflict pain on a prisoner by withholding treatment." In *Little v. Walker*, 552 F.2d at 198 n.8, the Seventh Circuit held that "either . . . actual intent or recklessness" will provide a sufficient foundation for a section 1983 claim.

Intent in the constitutional sense means something different than some malicious purpose to deprive constitutional rights. This instruction explained that to the jury.

Defendants argue that the court erred by denying them a good faith instruction. They agreed that *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), established the applicable standard. Defendants proposed the following instruction:

> The law provides that public officials may assert a qualified immunity from liability in a civil rights suit for actions undertaken in their official capacities.
>
> If you view the defendants' actions objectively, and find that such actions were done in good faith and within the scope of their authority as public officials, you may find them liable only if you determine that: a clearly established constitutional right of the plaintiff was violated and that the defendant knew or should have known that their conduct violated that right.

Defendants' Instruction No. 26. This misstates the law. *Harlow* established two alternative tests, not one two-pronged test. The case held that defendants could establish a qualified immunity by showing *either* that the constitutional right involved was not clearly established, 457 U.S. at 818, *or* that, if clearly established, the defendant, because of extraordinary circumstances, neither knew nor should have known of the legal standard that governed how much protection he or she had to provide the plaintiff, *id.* at 819.

The court refused to give defendants' good faith instruction because the record lacked any evidence on the issue. The constitutional right to protection from attacks by

fellow inmates goes back at least five years before the attack in this case. The law was clear. Therefore, defendants had to introduce evidence that because, of extraordinary circumstances, they "neither knew nor should have known of the relevant standard." *Harlow*, 457 F.2d at 819. Defendants submitted no evidence that they misunderstood what standard governed their conduct. Throughout the case, they acknowledged their duty to protect Watts. They never claimed that the incident arose because they were confused about whether they had to segregate Watts from Greaves. Without any evidence that knowledge of the standard was in doubt, a good faith instruction would only have confused the jury and prejudiced plaintiff.

C. *Motion for New Trial*

On a motion for new trial, the judge "has a duty to set aside a verdict and grant a new trial even though it is supported by substantial evidence, 'if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which . . . will result in a miscarriage of justice.' " *Wyatt v. Interstate Ocean Transport*, 623 F.2d 888, 891 (4th Cir. 1980) (quoting *Williams v. Nichols*, 266 F.2d 389, 392 (4th Cir. 1959)). The court can weigh the evidence and consider the credibility of witnesses. *Id.* at 891.

Defendants claim that they are entitled to a new trial for all the reasons raised by their motion for judgment notwithstanding the verdict. With respect to the defendants other than Barry Steele, the court finds these reasons insufficient. Although these defendants vigorously dispute Watts' credibility and the plausibility of his story, a sharp credibility conflict should be resolved by the jury. *See Williams v. City of Valdosta*, 689 F.2d 964, 974 (11th Cir. 1982) ("[W]hen the trial involves simple issues, highly disputed facts, and there is an absence of 'pernicious occurrences' trial courts should be considerably less inclined to disturb a jury verdict."). This court does not find that

allowing the verdicts to stand against these defendants will perpetrate a miscarriage of justice. The court can examine the witnesses' credibility, but it finds none of Watts' evidence unbelievable enough to usurp the jury's judgment.

III. *Conclusion*

In accordance with the above, the court grants defendants' motion to clarify the judgment. The earlier judgment is vacated. Defendants Brown, Cejka, Laurant and Vanjoske are together liable to Watts for no more than a total of $40,000. Each one, however, is liable to Watts for up to $40,000 until the judgment is satisfied. The court grants Barry Steele judgment notwithstanding the verdict, but denies the other defendants' motion for judgment notwithstanding the verdict and new trial. Plaintiff shall submit a new bill of costs to reflect the court's disposition of Barry Steele's motion.

ENTER:

/s/ Bernard M. Decker
United States District Judge

DATED: July 2, 1984.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 85-1010, 85-1053, 85-1084, 85-1095

JUNIOR RAY DUCKWORTH, et al.,
Plaintiffs-Appellees, Cross-Appellants,

v.

GAYLE FRANZEN, et al.,
Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court
for the Southern District of Illinois, Alton Division.
No. 80 C 5057—**William L. Beatty**, *Judge*.

ARGUED OCTOBER 31, 1985—DECIDED DECEMBER 17, 1985

Before BAUER, POSNER, and EASTERBROOK, *Circuit Judges.*

POSNER, *Circuit Judge.* In November 1979 a bus used to transport prisoners between Illinois prisons caught fire from unknown causes. When the fire broke out, the 35 prisoners in the bus were in handcuffs, with all the prisoners on each side of the aisle being joined together by a chain running through the handcuffs. For reasons of security all exits but the front door of the bus had been sealed and there was a metal screen (like a mesh fence), probably locked (but the record is not clear on this), between the passenger area and the front door. When the bus filled with dense smoke each group of prisoners tried

to rise and make its way to the front exit, but only one prisoner (who had managed to slip out of his handcuffs) succeeded in getting out, and a guard thrust him back into the bus. Eventually guards equipped with gas masks cut through the chains and brought the prisoners out. One prisoner died from the ordeal. Others suffered serious, and in at least one case permanent, lung injury. Twenty-one of the injured prisoners brought suit against three prison officials and three guards under section 1 of the Civil Rights Act of 1871 (now 42 U.S.C. § 1983), charging that by failing to take effective precautions against the consequences of a fire on the bus the defendants had visited cruel and unusual punishment on the plaintiffs in violation of the Eighth Amendment, which has been held applicable to the states under the due process clause of the Fourteenth Amendment. The complaint included a pendent claim against these six defendants for negligence and a diversity claim based on products liability against a seventh defendant, the manufacturer of the bus.

The district judge severed the claim against the bus company, and it remains in the district court, awaiting trial. He dismissed the pendent claim. The civil rights claim was tried to a jury, which awarded damages totaling $561,000 (including punitive damages) against three of the defendants—Franzen, the head of the Illinois prison system at the time of the fire; Wolff, the then warden of Joliet prison, the distribution point for prisoners entering the Illinois prison system and the place where the bus was kept; and Hert, the then director of security at Joliet—but exonerated the three guards who had been in charge of the bus when the fire occurred. Although the judgment is not final in the sense of winding up the entire litigation—for the plaintiffs' claim against the bus company has yet to be tried—the judge quite properly has certified the judgment for an immediate appeal under Rule 54(b) of the Federal Rules of Civil Procedure. It disposes, with finality in the district court, of the claims against the other defendants, and they should not have to wait until the case against the bus company is concluded to get a definitive determination of their liability.

The three defendants who were found liable argue mainly that the plaintiffs' suit is barred by the Eleventh Amendment and that in any event no reasonable jury could have found them guilty of inflicting cruel and unusual punishment. The plaintiffs, cross-appealing from the dismissal of the pendent claim, argue that the district judge was wrong to think it barred by the Eleventh Amendment, especially when the judge thought the Eleventh Amendment no bar to the civil rights claim. Several of the plaintiffs also challenge the jury's award of damages to them, as too low.

The defendants say they were sued in their official capacities, making this a suit against the state. If you believe that a state officer has violated your constitutional rights, you have a choice between suing the officer personally and suing the state. If you go the former route you don't have to worry about the Eleventh Amendment but do have to worry about various personal defenses, such as good-faith immunity; if you go the latter route you don't have to worry about personal defenses but may have to worry about the Eleventh Amendment. See *Kentucky v. Graham*, 105 S. Ct. 3099, 3105-06 (1985). A suit against an official in his official rather than individual capacity is a suit against the state. See *id.* at 3105; *Brandon v. Holt*, 105 S. Ct. 873, 878 (1985).

The complaint named Franzen "in his capacity as Director of the Illinois Department of Corrections," but Wolff and Hert merely as "Former Warden of the Joliet Correctional Center" and "Former Chief of Security" at Joliet, respectively, and the three guards just as "Officers of the Illinois Department of Corrections." The same designations appear in the part of the complaint that asks for damages. All this might seem to clinch the case for regarding the suit against Franzen, at least, as an official-capacity suit and hence barred by the Eleventh Amendment; for section 1983 did not abrogate the states' Eleventh Amendment immunity from damage suits, *Owen v. Lash*, 682 F.2d 648, 654 (7th Cir. 1982), and Illinois has not waived that immunity. Although the Eleventh Amend-

ment, read literally, forbids the federal courts to exercise jurisdiction over any suit by a citizen against a state, they may do so if the state consents, *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam)—a rare example of the conferral of subject-matter jurisdiction by consent.

Not only suing a defendant in his official capacity, but even just naming the defendant's office, raises a presumption that he is being sued only in his official capacity. See, e.g., *Kolar v. County of Sangamon*, 756 F.2d 564, 568-69 (7th Cir. 1985); *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869-70 and n. 12 (7th Cir. 1983). It suggests that the plaintiff is really after the employer, which is to say the state or a state agency. But the presumption cannot be conclusive in a system such as the Federal Rules of Civil Procedure create, in which the complaint does not fix the plaintiff's rights but may be amended at any time to conform to the evidence. See Fed. R. Civ. P. 15(b); *Phillips v. Vandygriff*, 711 F.2d 1217, 1225 n. 9 (5th Cir. 1983). Whatever the plaintiffs may have had in mind when they named Franzen "in his capacity as Director" of the Illinois prison system, the case was tried as a suit against the defendants as individuals. This is shown most dramatically by the fact that the judge, at the defendants' request, instructed the jury that all of the defendants were being sued as individuals, that they were liable only for their personal acts or omissions to act, and that neither the State of Illinois nor the Illinois Department of Corrections was a defendant.

The defendants do not argue that the form of the complaint misled them. Bear in mind that Franzen resigned as Director of the Illinois Department of Corrections while the suit was in progress, while Wolff and Hert had already resigned from the offices named in the complaint. If the state attorney general's office, which represents state officials whether sued in their official or individual capacities, had thought this a suit against Franzen or Wolff or Hert in their official capacities, we do not understand why it did not move in either the district court or this court to substitute their successors in office as defen-

dants in their place. See Fed. R. Civ. P. 25(d)(1); Fed. R. App. P. 43(c). We hold that substance trumps form and that all the defendants were sued in their individual capacities. That this issue may not recur we urge counsel for civil rights plaintiffs when they are suing a state officer in his individual capacity to say so plainly; and if in both his individual and official capacities to make that unmistakably clear, too. *Kolar v. County of Sangamon, supra*, 756 F.2d at 568-69.

But being sued in their individual capacities the defendants could be held liable only for their individual wrongdoing. Section 1983 does not recognize a doctrine of superiors' liability. *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1390 (7th Cir. 1984). Such a doctrine would be analogous to respondeat superior, which makes the employer, as distinct from a superior employee, liable for an employee's tort—and which is also unavailable in suits under section 1983. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691-94 (1978). So Franzen could not be held liable for the torts of his subordinates in the Department of Corrections. As there is no evidence of Franzen's individual wrongdoing—no evidence for example that he rewrote the guards' manual to eliminate some safety precaution in the event of fire—it may seem that the suit must really be against the office, and hence the state, not against the man. But the plaintiff is the master of his complaint. If he proceeds on a theory that he cannot substantiate factually, he is barred because of his failure of proof, not because another theory which he did not pursue is barred by an immunity. The plaintiffs charged Franzen with personal wrongdoing. Having utterly failed to prove that, they cannot get a judgment against him, but this conclusion has nothing to do with the Eleventh Amendment and does not resolve the liability of the other defendants.

An Illinois statute entitles state employees to be indemnified by the state for damages imposed on them for acts committed in the course of their state employment, unless the employee acted willfully or wantonly. Ill. Rev. Stat.

ch. 127, ¶ 1302 (d). The defendants argue that the statute makes this a suit against the state, because the state will end up footing the bill for any damage judgment against them. Yet every court that has considered this issue has rejected, rightly in our view, the argument that an indemnity statute brings the Eleventh Amendment into play. See, e.g., *Wilson v. Beebe*, 770 F.2d 578, 588 (6th Cir. 1985); *Demery v. Kupperman*, 735 F.2d 1139, 1146-49 (9th Cir. 1984); *Downing v. Williams*, 624 F.2d 612, 626 (5th Cir. 1980), vacated on other grounds, 645 F.2d 1226 (1981) (per curiam).

Forget about the fact that the statute does not require the state to indemnify for punitive damages (because awarded only for conduct that is willful or wanton, or much worse); for as a matter of fact the State of Illinois usually indemnifies its employees for such damages and we assume would do so here. Nevertheless the purpose of the Eleventh Amendment is only to protect the state against involuntary liability. If the state chooses to pick up the tab for its errant officers, its liability for their torts is voluntary. It is true that the burden of tort judgments against state employees may eventually come to rest on the state with or without indemnity. If the state doesn't indemnify its officers it may have to pay them higher salaries so that they can buy insurance that will do so. But this type of argument has never succeeded in getting the bar of the Eleventh Amendment extended to suits against state officers in their individual capacities, and anyway is unrelated to the indemnity statute. Moreover, it would be absurd if all a state had to do to put its employees beyond the reach of section 1983 and thereby make the statute ineffectual except against employees of local governments (local government is not protected by the Eleventh Amendment) was to promise to indemnify state employees for any damages awarded in such a suit.

The defendants' last argument under the Eleventh Amendment is that since state law requires the state to pay, and it has paid, the plaintiffs' medical expenses, this suit insofar as it seeks the recovery of such expenses as

an item of damages is really against the state. The opposite would be more nearly correct, once it is established that this is a suit against the defendants in their individual rather than official capacities. Insofar as the state has paid medical expenses incurred as a result of the defendants' wrongful acts, the state would have (but for the indemnity statute) a claim against the defendants to reimburse it. Its position would be akin to that of a coplaintiff, subrogated to so much of the plaintiffs' claim as seeks reimbursement for medical expenses that the state rather than the plaintiffs has actually borne.

The defendants' alternative argument against liability is that, even viewing the evidence in the light most favorable to the plaintiffs, as of course we must do in appraising the argument, what they did could not reasonably be thought a violation of the Eighth Amendment. Negligence, perhaps; gross negligence—giving due regard for the jury's verdict—perhaps; but not cruel and unusual punishment. This is clear enough with regard to Franzen. Not having been personally involved in the security and safety measures regarding the bus, he is guilty at worst of neglect. But the other two appellants were personally and responsibly involved in securing the bus and in taking or failing to take measures to assure the safety of the prisoners transported on the bus. Their role is analogous to that of the police chief in *McKinnon v. City of Berwyn, supra*, 750 F.2d at 1391, who, having participated in conduct of his subordinates that led to the plaintiff's false arrest and brutal treatment, could be jointly liable with them for violating the plaintiff's civil rights. Still we must decide whether what Wolff and Hert did or failed to do amounted to the infliction of a cruel and unusual punishment.

The constitutional prohibition of "cruel and unusual punishments" apparently was intended, as the words suggest, merely to prohibit barbarous punishments—punishments having the character of torture, see Granucci, "*Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839, 840-42 (1969)—although the Supreme Court has interpreted the historical record

somewhat more broadly, see, e.g., *Ingraham v. Wright*, 430 U.S. 651, 664-67 (1977). And originally, of course, the prohibition was only against the federal government's inflicting such punishments, the Bill of Rights not being applicable to the states. But the Supreme Court has decided that freedom from cruel and unusual punishments is one of the liberties secured against state action by the due process clause of the Fourteenth Amendment, and like freedom of speech one of those liberties a state cannot deprive a person of even if does so by impeccable procedures. See, e.g., *Robinson v. California*, 370 U.S. 660 (1962); *Estelle v. Gamble*, 429 U.S. 97 (1976).

Even so, the plaintiffs could get nowhere if the words "unusual" and "punishment" were given anything like their normal meanings. The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century; Samuel Johnson's *Dictionary of the English Language* (1755) defines "punishment" as "Any infliction or pain imposed in vengeance of a crime." If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment, and "cruel and unusual" because the Supreme Court has interpreted the term to forbid unauthorized and disproportionate, as well as barbarous, punishments. See *Ingraham v. Wright*, *supra*, 430 U.S. at 664-67, summarizing the case law. But if the guard accidentally stepped on the prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985. Again, if a prisoner has a serious illness and the prison staff, though fully aware of the gravity of the illness, refuses to treat it and the prisoner dies, this could well be deemed, and under current case law would be deemed, the infliction of punishment. See, e.g., *Joseph v. Brierton*, 739 F.2d 1244, 1246 (7th Cir. 1984). But if the staff merely misdiagnoses the illness and thinking it trivial does not treat it, and the prisoner dies, this would not be punishment in any accepted meaning of the word even if the diagnosis

was negligent. See, e.g., *Benson v. Cady*, 761 F.2d 335, 341 (7th Cir. 1985) (dictum).

These are the easy cases; the hard ones are where the behavior of the prison's staff is somewhere in between careless and deliberate infliction of suffering; and we must consider where the line is drawn. The reigning formula of course is "deliberate indifference," e.g., *Jones v. Morris*, No. 84-2639, slip op. at 5 (7th Cir. Nov. 27, 1985), but the term is not self-defining. Indeed, like other famous oxymorons in law—"deliberate speed" for example or "substantive due process"—it evades rather than expresses precise meaning.

The usual intermediate category in law between negligence and deliberateness is recklessness; and reflection on the commonest legal meanings of "reckless" may point us to a solution of our conundrum. One usage, common in tort law, essentially equates recklessness to gross negligence. See Prosser and Keeton on the Law of Torts 214 (5th ed. 1984). If negligence under Judge Learned Hand's formula in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), and in later cases such as *United States Fidelity & Guaranty Co. v. Jadranska Slobodna Plovidba*, 683 F.2d 1022, 1026 (7th Cir. 1982), means that the cost of averting an accident is less, even if just a hair's breadth less, than the expected cost of the accident that would be averted, recklessness in the sense of gross negligence means that the disparity between the cost of prevention and the expected accident cost is great. A quite different sense of recklessness, familiar from criminal law, is the sense in which for example a wrongful, deliberate, and very dangerous act which results in death though death was not intended may be downgraded to second-degree murder, with first-degree murder being reserved for deliberate homicide. A classic example is where the defendant chokes his victim, intending to injure him seriously but not to kill him, but death results. See *Commonwealth v. Marshall*, 287 Pa. 512, 135 Atl. 301 (1926); LaFave & Scott, Handbook on Criminal Law 568 (1972). The defendant has deliberately committed an act

that is at once socially costless to avoid (by not choking his victim in the first place) and highly dangerous. So he is severely punished, for an act that was deliberate and wrongful as well as for a consequence that was lethal though unintended. As this example suggests, recklessness in criminal law implies an act so dangerous that the defendant's knowledge of the risk can be inferred. See Perkins & Boyce, Criminal Law 849-51 (3d ed. 1982).

If the word "punishment" in cases of prisoner mistreatment is to retain a link with normal usage, the infliction of suffering on prisoners can be found to violate the Eighth Amendment only if that infliction is either deliberate, or reckless in the criminal law sense. Gross negligence is not enough. Unlike criminal recklessness it does not import danger so great that knowledge of the danger can be inferred; and we remind that the "indifference" to the prisoner's welfare must be "deliberate," e.g., *Estelle v. Gamble*, *supra*, 429 U.S. at 104; *Jones v. Morris*, *supra*, slip op. at 5-6, implying such knowledge. Although some cases contain language more suggestive of the tort definition of recklessness than of the criminal law definition, see, e.g., *Benson v. Cady*, *supra*, 761 F.2d at 339-40; *Estate of Davis v. Johnson*, 745 F.2d 1066, 1071 (7th Cir. 1984); *State Bank v. Camic*, 712 F.2d 1140, 1146 (7th Cir. 1983), they are cases where the prisoner had failed to prove recklessness even in the tort sense, and it was not important therefore whether he would have had to prove even more in order to win the case.

The cases where a prisoner complaining of mistreatment has been allowed to recover damages under the Eighth Amendment in fact involve recklessness in the strong sense. For example, if a prisoner tells the prison doctor that he is allergic to penicillin, but the doctor injects him with penicillin anyway and the prisoner has a severe reaction, the doctor is guilty of having inflicted a cruel and unusual punishment; that was our case of *Thomas v. Pate*, 493 F.2d 151, 158 (7th Cir.), vacated and remanded on other grounds under the name of *Cannon v. Thomas*, 419 U.S. 813 (1974) (per curiam). But if before injecting him

the doctor merely fails to tell the prisoner what is in the syringe, and thus gives the prisoner no chance to alert him to a possible (and quite common) allergy, the doctor is not guilty of violating the Eighth Amendment even if it is a palpable act of medical malpractice to inject someone with penicillin without first asking him whether he is allergic. Cf. *Estelle v. Gamble*, *supra*, 429 U.S. at 107. In the first case the doctor knows there is a great danger, could avert it at trivial cost (though greater than in the case of reckless murder that we gave earlier), but instead ignores it. In the second case the doctor should know there is some danger, but he is inadvertent. Although it is conceivable if improbable that his inadvertence would be deemed unreasonable enough—given the trivial burden of inquiry—to make his conduct reckless in a tort sense, punishment cannot be inadvertent. Punishment implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it. Such facts "as a history of accidents or a previous request for repairs that had fallen on deaf ears" are therefore important. *Jones v. Morris*, *supra*, slip op. at 5 n. 5.

In the present case, even if the defendants' conduct was negligent or even grossly negligent, a reasonable and properly instructed jury could not have found it sufficiently reckless to be called punishment. To begin with, the danger of a serious accident, though plain enough in retrospect, was not believed to be great and was not objectively so great that Wolff's and Hert's actual knowledge of the danger can be inferred. There had never been a fire on a prison bus in Illinois. This bus had been in service without incident for more than a year before the fire. The plaintiffs' able counsel presented no evidence of even a single instance in the history of this country (or for that matter any other country) of a fire on a prison bus or other vehicle in which someone was being transported under restraint. Obviously there have been such fires but they must be exceedingly rare.

Maybe no other bus has ever been so hard to get out of in an emergency as this one, but that is unlikely too. The security modifications that resulted in the sealing of the windows, roof hatch, and exits were copied from the buses that the Immigration and Naturalization Service uses to transport illegal aliens under arrest. Apparently none of those buses has ever been involved in an accident in which a prisoner was hurt because he had difficulty getting out of the bus. *McKinnon*, cited earlier, is illustrative of a number of cases where a prisoner was hurt by being banged against the inside walls of a speeding paddy wagon, see 750 F.2d at 1386, but that is an entirely different problem. The plaintiffs point out that the bus involved in the present case made long trips, while INS buses (maybe) operate mostly within cities, but we cannot see what difference that would make. It is the length of time a bus is in use rather than the length of the particular journey that counts in deciding whether the experience of the bus is comparable to that of some other bus, and there is no evidence that the INS uses its buses less than the Illinois prison authorities use theirs.

Although a manual prepared after the security modifications were made alludes to the possibility of fire, states truistically that "a fire which cannot be extinguished immediately should result in the orderly removal of residents [prisoners] from the bus," and adds somewhat ominously, "Under no circumstances should the restraining devices be removed unless a resident's life is in immediate danger," the defendants' foresight should not be the lever that raises their conduct from negligent to reckless. They realized that there could be a fire on the bus but given the absence of any known history of fires they naturally did not rate the danger high and therefore did not give much thought to the problems that might arise if there were a fire; other problems of prison administration must have seemed much more pressing. In particular they failed to realize that a large group of prisoners who were chained together might have difficulty getting out of the bus. While the chain itself was not fastened to the bus, if one

prisoner tripped on his way out—a likely occurrence in conditions of panic, fear, and in this case darkness caused by smoke (but the density of the smoke was hardly foreseeable)—the rest of the group would be stuck; and there were two groups. All this is clear in hindsight. But it was not foreseen. People often fail to foresee disasters of a kind that have not yet occurred and to take effective precautions against them, and ordinarily such lack of foresight is at worst negligence; it certainly is not recklessness in anything like the criminal law sense of the word.

Davis v. United States, 716 F.2d 418 (7th Cir. 1983), a case under the Federal Tort Claims Act, provides an instructive contrast. The plaintiff broke his neck when he dove into a lake in a federal wildlife refuge. The bottom of the lake had dangerous rock outcroppings near the shore. The government had failed to take effective steps to warn the public of the danger even though there had been five similar diving accidents in another and similar lake in the same wildlife refuge in the recent past. We held that the government's failure to warn had been willful and wanton (=grossly negligent) but not willful and malicious. Yet it was a stronger case for the plaintiff than the present case. Here no history of accidents conveyed an unmistakable warning that the expected accident cost if no further precautions were taken was very high. And while the plaintiffs argue that the statement in the manual about "immediate" danger to life being the only warrant for removing handcuffs puts too much emphasis on security relative to safety and thereby evinces a conscious indifference toward prisoners' lives, they are putting too much emphasis on one word; the passage as a whole suggests a concern for, rather than callousness toward, prisoners' safety.

Not only was the perceived danger not great but the means of averting it were not simple, obvious, or cheap. Six years after the accident it is still not clear what the defendants should have done if they had thought more carefully about the danger that materialized. They could have forgone the security modifications. But the modifica-

tions were in response to a long history of escapes from Illinois prison buses. Thirty-five felons are a dangerous concentration. They cannot be transported with safety to themselves, the community, the driver, or the guards unless they are manacled and the exits sealed. The modifications were reasonable. The question was what to do, given them, to minimize the danger that the prisoners might be trapped in an accident or a fire.

This is a difficult question, reminding us that "the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). The plaintiffs tell us that after the accident the prison authorities put little plaques on the backs of the seats in the bus, telling the prisoners not to panic in the event of an accident or fire; this seems to us a meager palliative, unlikely to have had the slightest effect on what occurred on the day of the fire. The plaintiffs suggest that maybe a device could have been rigged by which the driver or a guard could push a button and release the chain and perhaps the sealed exits and windows. But the record contains no evidence concerning the feasibility, expense, or dangers of such a system (the danger, for example, that a prisoner would reach the button).

Maybe the prisoners shouldn't have been chained to one another. Maybe fewer prisoners should have been transported at one time. The plaintiffs do not press these points on us. Their principal suggestion is—fire drills. This we find impossible to visualize. The bus starts in Joliet and meanders about the state, dropping off prisoners at the various prisons to which they have been assigned after being processed at the intake center at Joliet and picking up prisoners who are being transferred to other prisons. The logic of the plaintiffs' argument is that every time the bus picked up a new passenger there would have to

be a new fire drill. Guards would have to surround the bus to make sure the prisoners didn't use the occasion of the fire drill to run away. Maybe, despite these objections, prison bus fire drills are a good idea but they are not so simple and obvious a one that the failure to have conducted them—before there had been an accident—convicts the defendants of a deliberate indifference to the safety of their charges. The record contains no evidence about precautions used by other prison systems. It is of course possible that the fault here lay not with the officials responsible for the security and safety arrangements of the bus but with the guards who reacted slowly to the fire and failed to release the chains that bound the prisoners in clumsy groups—not to mention the guard who forced one prisoner back into the bus. But the jury exonerated the guards and the plaintiffs have not appealed from that part of the judgment.

We know the cases in which prison officials have been ordered to take steps to remove fire hazards, and we acknowledge that in some of them little attention was paid to the question whether the hazards were so great as to amount to cruel and unusual punishment. See, e.g., *Hoptowit v. Spellman*, 753 F.2d 779, 783-84 (9th Cir. 1985); *Santana v. Collazo*, 714 F.2d 1172, 1183 (1st Cir. 1983); *Leeds v. Watson*, 630 F.2d 674, 675-76 (9th Cir. 1980); *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977). In others, however, this essential requirement for liability was properly stressed. See, e.g., *Shrader v. White*, 761 F.2d 975, 984-86 (4th Cir. 1985); *Ruiz v. Estelle*, 679 F.2d 1115, 1152-53 (5th Cir. 1982), modified, 688 F.2d 266, 267 (1982) (per curiam). The latter decisions (amongst which we include our recent decision in *French v. Owens*, No. 83-2280, slip op. at 15 (7th Cir. Nov. 26, 1985), where we said, "The eighth amendment does not constitutionalize the Indiana Fire Code") we consider better reasoned. But in any event the cases that involve equitable remedies against fire hazards in prisons are distinguishable from this case. Prison fires, as distinct from prison *bus* fires, are common and both their hazards and the necessary precautions

well known. A judgment of reckless disregard for prisoners' safety is therefore easier to make. And there is a difference between a suit to remove a fire hazard and a suit for damages after a fire has occurred. In the former case the filing of the suit puts the prison officials on notice of a potential hazard; and if the hazard is demonstrated, yet they refuse to do anything, maybe that is evidence of a reckless disregard for safety.

The district judge should have granted judgment for the defendants notwithstanding the jury's verdict; obviously the cross-appeal by the individual plaintiffs who complain that the damages the jury awarded were inadequate must be dismissed. The defendants' complaints about the jury instructions and evidentiary rulings are moot.

That leaves only the question whether the judge was right to dismiss the pendent claim. He thought it barred by the Eleventh Amendment. But if, as he and we believe, the civil rights claim was brought against the defendants in their individual capacities, we can think of no reason for believing that the pendent negligence claim was brought against them in their official capacities; nor do the defendants suggest any reason. The judge hinted that he might have dismissed the pendent claim anyway because the jury might be confused if it had to consider the defendants' liability under both the Eighth Amendment and the common law of negligence. But we do not understand this either. The plaintiff in a personal injury case will often allege different levels of culpability, ranging upward from negligence, in the hope of getting punitive as well as compensatory damages or of defeating defenses such as comparative or contributory negligence that are effective only against the lesser forms of culpability. This has never been thought a source of serious confusion. The almost complete factual overlap between the main and pendent claims in the present case makes this a natural case for the retention rather than relinquishment of pendent jurisdiction; and while the district judge has a broad discretion in making what amounts to a managerial judgment on whether to allow a plaintiff to bring one case

in federal court or force him to litigate his state claim in state court, we cannot uphold an exercise of discretion so flawed as the one before us.

But what to do about this is another question. Since we are ordering the federal claim dismissed, since pendent party jurisdiction cannot be used to reattach the pendent negligence claim to the plaintiffs' diversity claim against the bus company, *Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005, 1007-09 (7th Cir. 1982), and since pendent claim jurisdiction should normally be relinquished when the federal claim is dismissed before trial, see *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), it would seem that a remand to the district court to reconsider his ruling on pendent jurisdiction could have but one result: the dismissal of the pendent claim.

But two considerations argue against this result. The first, and lesser, is that where there has been a trial, considerations of judicial economy may support retention of the pendent claim for any further trial proceedings, as we said in *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 458-59 (7th Cir. 1982). But that was a case where the pendent as well as main claims had been tried once, and the question was whether the retrial was to be in federal or state court; even then we noted reasons for relinquishing pendent jurisdiction—which the district judge in fact did on remand. See *In re Cenco Inc. Securities Litigation*, 601 F. Supp. 336, 342-44 (N.D. Ill. 1984).

Second, and more important, the statute of limitations has run on the pendent claim. This is a conventional reason against relinquishing pendent jurisdiction after dismissal of the main claim. See, e.g., *O'Brien v. Continental Illinois Nat'l Bank & Trust Co.*, 593 F.2d 54, 65 (7th Cir. 1979); *Joiner v. Diamond M Drilling Co.*, 677 F.2d 1035, 1043 (5th Cir. 1982). Ordinarily, however, it is not a reason in the federal courts of Illinois. An Illinois statute provides that a case dismissed by a federal court on jurisdictional grounds—and a relinquishment of pendent jurisdiction is jurisdictional—can be refiled within a year

in state court, and in the interim the statute of limitations will stop running. Ill. Rev. Stat. ch. 110, ¶ 13-217; see *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 188 (7th Cir. 1984). But this particular provision became effective in 1980, after this suit was brought. We know the provision would not be applied retroactively to revive a time-barred cause of action, see *Conner v. Copley Press, Inc.*, 99 Ill. 2d 382, 388, 459 N.E.2d 955, 957 (1984), but the plaintiffs' suit was not time-barred when the provision was enacted. Even if the new provision is applicable, however, another obstacle looms: the one-year period in an earlier but materially identical statute was held to begin running when the case was dismissed rather than when the dismissal was affirmed. See *Hupp v. Gray*, 73 Ill. 2d 78, 382 N.E.2d 1211 (1978). If this ruling applies to the current statute, as well it may, the period for filing suit in state court has long since run out.

Given these uncertainties, on remand the district judge should not dismiss the pendent claim unless the defendants agree to waive their statute of limitations defense in state court. See *Financial General Bankshares, Inc. v. Metzger*, 680 F.2d 768, 778 (D.C. Cir. 1982). This point is applicable, by the way, to all the defendants, not just the three who are the appellants. With regard to retention of a pendent claim in order to prevent the bar of the statute of limitations from falling, it does not matter when the main claim is dismissed; it certainly does not matter whether it is after trial (as in the case of the three guards) or after appeal (as in the case of the three officials who are the appellants).

We reverse the district judge's judgment for plaintiffs with directions to dismiss the federal claims with prejudice, but we also reverse the judgment insofar as it dismissed the pendent claim. The plaintiffs have lost their constitutional tort suit against the six defendants involved in this appeal but their common law tort suit against them remains alive. The case is remanded for further pro-

ceedings consistent with this opinion; no costs in this court.

REVERSED AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 1, 1985

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*

JEFFREY WATTS,

Plaintiff-Appellant, Cross-Appellee,

Nos. 84-2219 and 84-2290

vs.

JAMES LAURENT, Youth Supervisor II, et al.,

Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 C 4593
Bernard M. Decker, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *in banc* filed by defendants-appellees, cross-appellants in the above-entitled cause on October 10, 1985, no judge in regular active service has requested a vote thereon, and all judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.